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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 282

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY,
Petitioners,

vs.

J. H. WIGGINS.

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Subject Index.

	Page
Petition for a writ of certiorari	1
Summary statement of the matter involved	1
Defenses	2
Safety rules	3
Operating rules	4
Summary of the facts admitted and shown by the testimony	7
Reasons relied upon for the allowance of the writ	8
Precise questions involved	9
Prayer for writ	10
Brief in support of petition	11
Opinion of the court below	11
Jurisdiction	11
Precise Question No. 1—Under the circumstances stated, was not the negligence of the plaintiff in failing in his duty to obey the rules of the defendants and keep a lookout for the open switch so as to avoid running the motor car into it the sole proximate cause of his injuries of which he complains?	9, 12
Precise Question No. 2—When plaintiff permitted one of the section hands under him, in violation of the rules, to operate the motor car at the time and place of the accident, and the condition of the switch was plainly observable and plaintiff placing himself in front of the actual operator so that he could not properly operate the motor car, did not the plaintiff thus assume the risk attendant thereon?	9, 15

Table of Cases Cited.

Atchison, T. & S. F. Ry. Co. v. *Ballard*, 108 F. (2d) 768	15
Bacon v. *Payne*, 190 N. W. 716	14
Buie v. *Powell*, 1 S. E. (2d) 102	15

Page

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. 33 ..... 9, 12
Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131 ..... 9, 12
Great Northern R. Co. v. *Wiles*, 240 U. S. 444, 60 L. Ed. 732 ..... 9, 12, 15
Hudson v. *Norfolk & W. Ry.* Co., 146 S. E. 525 14
Jaggers v. *Southeastern Greyhound Lines*, 34 Fed. Supp. 667 13
Louisville & N. R. Co. v. *Brown*, 81 So. 156, 77 Fla. 64 15
Louisville & N. R. Co. v. *Davis*, 75 F. (2d) 849 ..... 8, 12, 14
McCalmont, et al. v. *Pennsylvania R. Co.*, 283 Fed. 736 15
McFarland v. *C. & O. Ry. Co.*, 177 Ky. 551, 197 S. W. 944 16
Paster v. *Pa. R. R.*, 43 F. (2d) 908 14
Pere Marquette Ry. v. *Haskins*, 62 F. (2d) 806 14
Reynolds v. *N. Y. O. & W. Ry. Co.*, 42 F. (2d) 164 14
S. A. L. Ry. Co. v. *Horton*, 238 U. S. 492, 34 Sup. Ct. 635, 56 L. Ed. 1062 15
So. Ry. v. *Pearce*, 145 S. E. 154 14
Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224 ..... 9, 12
Unadilla Valley Ry. Co. v. *Dibble*, 31 F. (2d) 239 ..... 9, 12, 14

STATUTES CITED.

Federal Employers' Liability Act 2
Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347 11
Operating Rules of the Seaboard Air Line Railway:
Rule 1160 ..... 12, 14
Rule 1169 ..... 4, 5
Rule 1170 ..... 4, 5, 12, 14
Rule 1172 4
Safety Rules of the Seaboard Air Line Railway:
Rule XII-3 3
Rule XII-22 3
Rule XII-28 4

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vs.

J. H. WIGGINS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway, petitioners, present this petition for writ of certiorari to review a decision of the Circuit Court of Appeals, for the Fifth Circuit, and show unto this Honorable Court:

A.

Summary Statement of the Matter Involved.

Plaintiff was section foreman of the defendants, who, as Receivers, operated the Seaboard Air Line Railway properties at the time of the happening of the incident as the

basis of the suit, and brought the action as an employee under the Federal Employers' Liability Act.

The scene of the accident was near Oviedo, Florida, in Seminole County, on the 15th of February, 1938. Plaintiff claims he was injured by the motor car furnished him by defendants in his employment running into an open switch as he was proceeding to his work for the defendants.

The material points in plaintiff's claim are:

(A) Alleged negligence of defendants through their employees in leaving a switch open on defendants' railroad.

(B) Negligently allowing said switch to remain open.

(C) Injury of the plaintiff by defendants' negligently operating a motor car furnished by defendants for plaintiff in his employment, by negligently failing to have said motor car under proper control so as to avoid running into said open switch.

(D) The derailing of said motor car and injuring plaintiff by and through the servants and employees of defendants other than plaintiff in the course of their employment, in that the defendants negligently ran and operated the motor car by negligently failing to see the target indicating said switch was open in time to avoid running into said switch.

Jurisdictional matters and interstate commerce character of the railroad was not in question.

Plaintiff claimed total and permanent injuries (R. 14).

Defenses.

1. Defendants denied that plaintiff was riding on the motor car in the course of his employment and stated that he was section foreman of defendants and it was his duty to operate the motor car himself and it was not in the

course of his employment to ride on same when operated by some other person.

2. That the person operating the motor car was not then and there in the employ of the defendants acting in the course of his employment in the operation of the said motor car, and alleged that the rules of defendants provided that no person in the employ of the defendants was authorized to operate said motor car save and except the plaintiff himself, he being the section foreman and in charge of the motor car and the crew.

3. Denial that the defendants negligently left the switch open.

4. Denied that they negligently allowed the switch to remain open.

5. Denied that plaintiff was injured on account of or because of any negligence of defendants, and denies that he suffered injuries as alleged.

6. That at the time of the injury alleged in the accident on the 15th of February, 1938, that plaintiff was section foreman in the employment of the defendants and that he was governed by the following rules:

I. *Safety Rules.*

XII-3. The foreman or other employee to whom the car is assigned is responsible for the inspection, use, operation and care of the car. The foreman will personally operate the car, unless he has on the force a man better fitted to do so, but in no case is the foreman relieved of responsibilities for inspection, use, operation, and care.

XII-22. Motor cars will be run at a safe speed at all times and must not exceed those speeds provided by Rule 759.

XII-28. When operating cars thru towns and villages or when approaching highway crossings at grade, the car will be brought under complete control and no attempt will be made to cross any street or road until it is known to be safe. If necessary the foreman will stop the car and wait until there is no danger before crossing.

II. *Operating Rules.*

1160. Section Foreman must know that anything that interferes with the movement of trains at maximum speed is considered an obstruction and must be protected accordingly.

When track is obstructed or unsafe for passage of trains at maximum speed it must be protected a sufficient distance on each side by flagman with signals as prescribed in Rule 99.

1169. They will not permit any person to run any motor car, lever car, or velocipede over their section unless such person holds written permit from the General or Division Superintendent, Division Engineer or Road Master.

1170. Section Foreman should pass over their sections daily, if possible, and in any event as often as once every other day to inspect the condition of the road bed, main track, sidings, bridges, culverts, fences, road crossings, watercourses, telegraph and telephone lines, frogs and switches, and to see that they are in proper condition; and, if repairs are needed, have them attended to at once.

Careful watch should be kept for broken rails, loose bolts or nuts in joints, frogs and crossings. Water barrels at stations and on bridges and trestles should be kept filled and when out of repair and can not be repaired, report to Road Master.

1172. They must personally supervise the work and see that workmen faithfully perform their duties, and suspend

any subordinate for neglect or misconduct, reporting the same to the Road Master.

and that plaintiff violated these rules, stating that he had been employed by the defendants and Seaboard Air Line Railway Company for approximately thirty years, and that the rules were of long standing and were for his guidance in the management and operation of the motor car and he violated and refused to obey them and each of them.

7. That the plaintiff violated all of the rules aforesaid set out in the preceding paragraph and that such violation was the proximate cause of his injury.

8. Contributory negligence on the part of plaintiff in the violation of the rules aforesaid.

9. That defendant violated the following rule:

> "1169. They will not permit any person to run any motor car, lever car, or velocipede over their section unless such person holds written permit from the General or Division Superintendent, Division Engineer or Road Master."

in that he allowed someone else to operate the motor car in violation of the rule and therefore assumed the risk of the operation of the motor car by the individual operating same.

10. Pleads the violation of the following rule:

> "1170. Section Foreman should pass over their sections daily, if possible, and in any event as often as once every other day to inspect the condition of the road bed, main track, sidings, bridges, culverts, fences, road crossings, watercourses, telegraph and telephone lines, frogs and switches, and to see that they are in proper condition; and if repairs are needed, have them attended to at once.

> "Careful watch should be kept for broken rails, loose bolts or nuts in joints, frogs and crossings. Water barrels at stations and on bridges and trestles should be kept filled and when out of repair and can not be repaired, report to Road Master."

and says that it was plaintiff's duty to keep a lookout for the various switches into which the motor car ran and that he could have seen it if he had been looking and attending to his business and that his failure to do so, was the proximate cause of his injury.

These defenses were pleaded to all of the complaint except paragraphs six and seven, which as we have seen, charge the defendants as above set out:

(a) negligently operating the motor car by negligently failing to have said motor car under proper control so as to avoid running into said open switch.

(b) Said motor car was then and there caused to be derailed by the negligence of the defendants by and through their servants and employees other than plaintiff, in the course of their employment, in that defendants negligently ran and operated said motor car by negligently failing to see the target indicating said switch was open in sufficient time to avoid running into said open switch.

A motion was made as to paragraphs six and seven of the complaint, and being overruled, answer was filed as to six and seven which averred all the aforesaid defenses and again set up the violation of the same safety rules and set out that the plaintiff was in charge of the said motor car and if there were any negligence in the operation of same on the failure to see the target in time to stop, it was his negligence, and that his negligence was the proximate cause of his injury.

Summary of the Facts Admitted and Shown by the Testimony.

The accident happened on the 15th of February, 1938, about 8:30 to 9 o'clock in the morning. Plaintiff was Section Foreman of defendants as Receivers of the Seaboard Air Line Railway and had been such Section Foreman at different localities since June 28, 1907. The weather condition was such that the target of the switch could be seen for three hundred feet, and the plaintiff Wiggins said that he could have, if he had been looking, seen the switch that far; also for more than one hundred feet the actual condition of the rail could be seen as shown by photographs in the record, page 58, showing the switch open.

Plaintiff Wiggins was seated in front on the motor car and Earl Moore, one of the section hands, was sitting behind him operating the motor car, with the exception of keeping the lookout and was depending on Wiggins, the foreman, to take care of what was ahead. Apparently Moore and Wiggins saw the open switch about the same time, when the car was about four or five feet from the switch. Wiggins, from his interrogatories, said he didn't believe he could have stopped the motor car if he had been operating it, but stated: "I do not mean to state by this answer that had I been actually operating the car I would not have observed the danger at an earlier time". Earl Moore had no written permit to operate the car and the rules, even if Moore had had a permit, would not relieve the Section Foreman from the responsibility for the operation of the car, all of said rules being then currently in force.

The motor car had just passed a large celery washing plant and was approaching a crossing somewhat ahead, which was 87.6 feet from the switch to the center of the road crossing, which was not so badly obscured as appears by the photos shown in the record, pages 55-58 inclusive, and

the appearance of the place not having changed. There was no traffic on this road, nor the little used place by the track at the time of the accident.

Moore couldn't see ahead because Wiggins, the Foreman, was in front of him and Moore, in order to look ahead, had to look around or over Wiggins, and was depending on Wiggins.

At the trial it was conceded that the switch was left open by the employees of the defendants on the night of February 14, 1938.

At the conclusion of the testimony in the lower court on motion of defendants' counsel, the Court directed a verdict for the defendants and we deduce from the Court's statement as shown in the record, page 79, that it was on the ground that the plaintiff's negligence was the sole proximate cause of his injury based on the whole testimony before the Court.

An appeal to the Circuit Court of Appeals resulted in a reversal on the 23rd of May, 1941, and a copy of the opinion appears at page 91 of the Record.

Under date of June 12, 1941, order was entered in the Circuit Court of Appeals staying the Mandate pending the filing of this Petition in this court until August 1, 1941.

B.

Reasons Relied Upon for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Fifth Circuit in this cause has rendered a decision which is in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit: The Sixth Circuit in the case of:

Louisville & N. R. Co. v. *Davis*, 75 Fed. (2d) 849.

also in conflict with decision of the Second Circuit in the case of:

Unadilla Valley Ry. Co. v. *Dibble*, 31 Fed. (2d) 239.

It has decided a Federal case in a way probably in conflict with applicable decisions of this court, in that the decision of the Circuit Court of Appeals for the Fifth Circuit in the case at bar is in conflict with decisions of this court in the cases of:

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224;

Frese v. *Chicago B. & Q. R. Co.*, 263 U. S. 1; 68 L. Ed. 131.

Great Northern R. Co. v. *Wiles*, 240 U. S. 444; 60 L. Ed. 732.

Davis v. *Kennedy*, 266 U. S. 147; 69 L. Ed. 212, 45 Sup. Ct. Rep. 33.

The Circuit Court of Appeals for the Fifth Circuit in this case at bar decided an important question of law in conflict with a great weight of authority as hereinafter shown in the brief following.

C.

Precise Questions Involved.

1. UNDER THE CIRCUMSTANCES STATED, WAS NOT THE NEGLIGENCE OF THE PLAINTIFF IN FAILING IN HIS DUTY TO OBEY THE RULES OF THE DEFENDANTS AND KEEP A LOOKOUT FOR THE OPEN SWITCH SO AS TO AVOID RUNNING THE MOTOR CAR INTO IT THE SOLE PROXIMATE CAUSE OF HIS INJURIES OF WHICH HE COMPLAINS?

2. WHEN PLAINTIFF PERMITTED ONE OF THE SECTION HANDS UNDER HIM, IN VIOLATION OF THE RULES, TO OPERATE THE MOTOR

CAR AT THE TIME AND PLACE OF THE ACCIDENT, AND THE CONDITION OF THE SWITCH WAS PLAINLY OBSERVABLE AND PLAINTIFF PLACING HIMSELF IN FRONT OF THE ACTUAL OPERATOR SO THAT HE COULD NOT PROPERLY OPERATE THE MOTOR CAR, DID NOT THE PLAINTIFF THUS ASSUME THE RISK ATTENDANT THEREON?

D.

Prayer for Writ.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana, commanding that Court to certify and send to this Court on the day to be designated full and complete transcript of the record and all proceedings in the case entitled J. H. Wiggins, Appellant, versus Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway, Appellees, being Case No. 9757, to the end that this cause may be reviewed and determined by this court; that the decree of the Circuit Court of Appeals be reversed and that Petitioners be granted such other and further relief as may seem proper.

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LEGH R. POWELL, JR., AND HENRY W. ANDERSON, as Receivers of Seaboard Air Line Railway,

Petitioners,

vs.

J. H. WIGGINS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

At the time of the preparation of this Petition and Brief, the opinion in this case has not yet been published in the official reports, nor does it appear in the advance sheets of the Federal Reporter. A copy appears at page 91 of the Record.

II.

Jurisdiction.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347.

2. The date of the judgment to be reviewed is May 23, 1941.

3. The nature of the case, and the fact that the rulings below were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari under Subdivisions "A" and "B".

4. The following are the cases relied on to sustain the jurisdiction:

Louisville & N. R. Co. v. *Davis*, 75 F. (2d) 849;
Unadilla Valley Ry. Co. v. *Dibble*, 31 F. (2d) 239;
Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224;
Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131;
Great Northern R. Co. v. *Wiles*, 240 U. S. 444, 60 L. Ed. 732;
Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. Rep. 33.

Precise Question No. 1.

UNDER THE CIRCUMSTANCES STATED, WAS NOT THE NEGLIGENCE OF THE PLAINTIFF IN FAILING IN HIS DUTY TO OBEY THE RULES OF THE DEFENDANTS AND KEEP A LOOKOUT FOR THE OPEN SWITCH SO AS TO AVOID RUNNING THE MOTOR CAR INTO IT THE SOLE PROXIMATE CAUSE OF HIS INJURIES OF WHICH HE COMPLAINS?

Repetition of the facts set out in the petition will not be here repeated.

From the decision of the Circuit Court of Appeals it is found that the court entirely overlooked Rule 1170 and 1160 set out in the petition, and also pages 12 and 13 of the record, and the court seems to come to the conclusion that Wiggins' eyesight was defective, basing it on the fact that in the court room without his glasses he was unable to see

some photographs. R. 34, 35, whereas Wiggins detailed the positions showing that he was sitting out ahead, R. 27, and R. 30 shows the purpose of keeping a lookout. In answer to his Interrogatory, R. 49, No. 24, he said "I do not mean to state by this answer that had I been actually operating the car I would not have observed the danger at an earlier time". Naturally he wouldn't say how much earlier, and on page 51, Interrogatory 34, he says the weather condition was sufficiently clear to permit of safe operation and that the target was observable at three or four hundred feet, R. 52, No. 40.

Then Moore's testimony shows that Wiggins was up in front of him and he couldn't properly observe the track and was apparently depending on Wiggins (R. 60-61).

From the definition of proximate cause, which we believe is as good as can be found, in *Jaggers* v. *Southeastern Greyhound Lines,* 34 Fed. Sup. 667 as follows:

> "Proximate cause has been defined by many courts with many definitions. A practical construction placed upon the term by many courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. *A proximate cause is one where the effect was absolutely necessary.* That is, given the cause, the resultant effect is a necessity. This is the difference in a proximate cause and a remote cause. The remote cause is one where the effect is uncertain, vague, or indeterminate. *It is a cause where the effect does not necessarily follow.* The proximate cause must be active, operating and carrying and containing within, the possibility and potentiality for harm."

and the statement in the case in regard to conditions as follows:

> "There is ample authority for a distinction between a situation that might be a proximate cause and one which is merely a condition. 4 Blashfield's Cyclopedia

> of Automobile Law and Practice. Perm. Ed. Section 2535; Taylor *v.* Taylor, 144 Tenn. App. 101; Geisen *v.* Luce, 1932, 185 Minn. 479, 242 N. W. 8."

we feel confident that the decision of the Circuit Court of Appeals is clearly within the Petition for Certiorari. On creating conditions see:

Hudson v. *Norfolk & W. Ry. Co.*, 146 S. E. 525 (W. Va.);
Bacon v. *Payne*, 190 N. W. 716 (Mich.);
So. Ry. v. *Pearce*, 145 S. E. 154 (Ga.).

In the case of *Louisville & N. R. Co.* v. *Davis*, 75 F. (2d) 849, we find this language:

> "That Davis could not reasonably have anticipated the precise manner in which the injury would occur in not controlling. IT IS SUFFICIENT THAT A GENERALLY DANGEROUS SITUATION WAS FORESEEABLE."

Clearly the situation was foreseeable and clearly the leaving of the switch open created a condition; clearly under the rules it was a condition that the section foreman was bound to look out for under Rule 1170; it was clearly a condition that he must know under Rule 1160. The photographs, pages 55-58, show plainly the situation.

Wiggins never complained he couldn't see the target nor he couldn't see the open switch and if he couldn't see, what was he doing up in front trying to keep a lookout?

Plainly Wiggins failed to observe the rule and brings himself within the cases cited, *supra*, under jurisdiction to which we refer without again repeating, and cite the following:

Paster v. *Pa. R. R.*, 43 F. (2d) 908;
Pere Marquette Ry. v. *Haskins*, 62 F. (2d) 806;
Unadilla Valley Railway v. *Dibble*, 31 F. (2d) 239, C. C. A. 2nd. Ct.;
Reynolds v. *N. Y. O. & W. Ry. Co.*, 42 F. (2d) 164;

Great Northern R. Co. v. *Wiles,* 240 U. S. 444, 60 L. Ed. 732;
McCalmont et al. v. *Pennsylvania R. Co.,* 283 Fed. 736;
Buie v. *Powell,* 1 S. E. 2nd. 102.

We feel that the rules laid down are specific rules and being thus are controlled by the decision of the Circuit Court of Appeals, Fifth Circuit in the case of

Atchison T. & S. F. Ry. Co. v. *Ballard,* 108 F. (2d) 768.

The second precise question involved is:

WHEN PLAINTIFF PERMITTED ONE OF THE SECTION HANDS UNDER HIM, IN VIOLATION OF THE RULES, TO OPERATE THE MOTOR CAR AT THE TIME AND PLACE OF THE ACCIDENT, AND THE CONDITION OF THE SWITCH WAS PLAINLY OBSERVABLE AND PLAINTIFF PLACING HIMSELF IN FRONT OF THE ACTUAL OPERATOR SO THAT HE COULD NOT PROPERLY OPERATE THE MOTOR CAR, DID NOT THE PLAINTIFF THUS ASSUME THE RISK ATTENDANT THEREON?

This is very closely allied and related to the first one and the cases over-lap to considerable extent.

It is said in the case of:

Louisville & N. R. Co. v. *Brown,* 81 So. 156, 77 Fla. 64,

quoting from

S. A. L. Ry. Co. v. *Horton,* 238 U. S. 492, text 504, 34 Sup. Ct. 635, 56 L. Ed. 1062,

as follows:

> "While an employe assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employe has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establish-

ing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, *or it is so plainly observable that he must be presumed to have known of it.* The employe is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence."

See also:

McFarland v. *C. & O. Ry. Co.*, 177 Ky. 551, 197 S. W. 944.

From these authorities we feel that the right to have the Petition granted has been sustained.

Respectfully submitted,

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LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
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Petitioners,

vs.

J. H. WIGGINS

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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REPLY BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I.

Statement of the Case

Respondent refutes the following statement of fact unsupported by reference to the record contained on page 8 of the petition,

"Moore couldn't see ahead because Wiggins, the Foreman, was in front of him and Moore in order to look ahead, had to look around or over Wiggins, and was depending on Wiggins."

The Circuit Court of Appeals in its opinion states,

"Moore testified that had he been looking he could have seen the switch target easily, probably for a distance of three or four hundred feet." (R. 60-61).

The by-play between Moore and counsel for the defendant from which the latter draws the conclusion that Moore was depending on Wiggins speaks for itself. (R. 65).

Petitioner's statement omits the fact that Moore had been operating Wiggin's motor car for more than ten years for the reason that he was "better able to do so" within the meaning of Rule XII 3. (R. 28, 29, 66).

Otherwise the statement of the case is reasonably accurate, though more fairly and concisely stated in the opinion of the Circuit Court of Appeals. (R. 91-94).

We wish to call attention, however, to the ambiguity between Rule 1169 as construed by defendants and Rule XII 3, later promulgated, and point out that defendants not only stopped at establishing that each of these rules had once been promulgated, but resisted successfully every effort of the plaintiff to resolve the ambiguity (R. 28-30; 70-75;) which the court below held to be an improper exclusion of evidence (Opinion R. 94).

II.

Jurisdiction

Respondent admits jurisdiction, but denies that there is anything contained in the opinion below which places this case within the provisions of Section 5 (b) of Rule 38 of this Court.

III.

There Are No Reasons for the Allowance of the Writ.

1. There is no conflict with Louisville & N. R. Co. v. Davis (CCA 6) 75 Fed (2d) 849, cert. den. 296 US 603, which was a case in which plaintiff was foreman in charge of removing a brace from a piling by crane. One of his workmen warned him that the whole piling was coming up with the brace, indicating danger. Davis ordered the operation to proceed, which order was obeyed without negligence, and the piling fell loose, injuring Davis. It was very properly held that the sole proximate cause of Davis' injury was his own order, it being shown he had full opportunity to perceive and appreciate the danger.

The case at bar falls rather within the purview of Atlantic Coast Line Railroad Co. v. Jeffcoat, (Ala.) 107 So. 456, cert den., 271 U. S. 688, in which the plaintiff section crew foreman was held entitled to recover under these circumstances. The crew was employed in gauging and relining the rails and Jones, a crew member, was delegated the task of placing and removing the gauge from the tracks, this being an instrument which when left on the rails would probably wreck a passing train. As a train was seen approaching, the foreman ordered his men to "clear the track," and turned to other tasks. As the train was almost upon him, the foreman discovered the gauge had not been removed, and, acting in an emergency to remove it, he was injured. It was argued that the cause of his injury was his own negligent supervision, but it was held that such negligence on his part was at most contributory.

2. There is no conflict with Unadilla Valley Railroad Co. v Dibble (CCA 2) 31 F 2d 239, the case at bar coming within the principles explained in Miller v. Central Railway Co., of New Jersey (CCA 2) 58 F 2d 635, cert. den. 287 U. S. 617, for the

reason that the rules plaintiff is charged with violating are "rules generally enjoining caution, or responsibilty" and not rules prescribing "specific conduct." Gildner vs. Baltimore & Ohio Ry. Co. (CCA 2) 90 F 2d 635; Ballard v. Atchison T. & S. F. R. Co. (CCA 5) 100 F. 2d 162; Atchison T. & S. F. R. Co. vs. Ballard (CCA 5) 108 F. 2d 768).

3. There is no probable conflict with the Caldine line of decisions of this Court cited by petitioner, for the reason that this case is governed by the later decision of this Court in Rocco vs. Lehigh Valley R. Co., 288 U. S. 275, distinguishing the respective factual situations. It is there pointed out that the negligence sought to be attributed to the defendants in the Caldine line of cases was too remote in the light of plaintiffs' conduct to be actionable. To reach such a conclusion here, it is necessary to so discount defendants' admitted negligence in leaving a main line switch open, and in so operating the motor car, through Moore, as to collide with such switch though it was sufficiently visible to Moore to enable him to perceive it in time to stop.

Respectfully submitted,

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